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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARCUS DAVID JARRELL, Appellant.	2 CA-CR 2011-0348 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100861001

Honorable Clark W. Munger, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
Joseph L. Parkhurst, and Kristen Yolland,
a student certified pursuant to Rule 38(d),
Ariz. R. Sup. Ct.

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery

Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Marcus Jarrell appeals from his convictions and sentences for aggravated driving under the influence of an intoxicant (DUI) having been convicted of two or more prior DUI violations. He argues the state failed to present sufficient evidence of the acts underlying his prior Florida DUI convictions. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Jarrell's convictions and sentences. *See State v. Bigger*, 227 Ariz. 196, ¶ 2, 254 P.3d 1142, 1145 (App. 2011). Officer Jeff Hawkins stopped Jarrell for making an improper turn and repeatedly weaving his car across the lane divider. Jarrell displayed six out of six cues for impairment during a horizontal gaze nystagmus test, and had a blood alcohol concentration of .251 and .259. He also admitted to Hawkins he had prior DUI convictions in Florida in 2001 and 2005. Jarrell was charged with (1) aggravated DUI while his driver license was suspended, revoked, or restricted; (2) aggravated driving with an alcohol concentration of .08 or more while his driver license was suspended, revoked, or restricted; (3) aggravated DUI having committed or been convicted of two or more prior DUI violations; and (4) aggravated driving with an alcohol concentration of .08 or more, having committed or been convicted of two or more prior DUI violations. Only the convictions for counts three and four are at issue on appeal.

¶3 Prior to trial, Jarrell moved to dismiss counts three and four, arguing the Florida DUI statute allowed convictions for driving under the influence of substances not included in the Arizona DUI statutes. The trial court denied the motion. At trial, the

court admitted redacted copies of the records of Jarrell's two Florida DUI convictions without objection from Jarrell. After a four-day jury trial, Jarrell was convicted as charged. For each conviction, he was sentenced to concurrent terms of four months' imprisonment and placed on probation for a period of ten years. This appeal followed.

Discussion

¶4 Jarrell argues the state failed to present sufficient evidence of the acts underlying his prior Florida DUI convictions. Jarrell failed to raise this issue in the trial court. "When a defendant does not object below to an alleged error, we review solely for fundamental error." *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 7, 185 P.3d 135, 138 (App. 2008). Fundamental error goes to the foundation of the case, takes from the defendant a right essential to his defense, and is of such magnitude the defendant could not have received a fair trial. *Id.*

¶5 Section 28-1383(A)(2), A.R.S., provides "[a] person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person":

> Within a period of eighty-four months commits a third or subsequent violation of § 28-1381, § 28-1382 or this section or is convicted of a violation of § 28-1381, § 28-1382 or this section and has previously been convicted of any combination of convictions of § 28-1381, § 28-1382 or this section or acts in another jurisdiction that if committed in this state would be a violation of § 28-1381, § 28-1382 or this section.

¶6 Jarrell argues the state failed to present sufficient evidence of the acts underlying his prior Florida DUI convictions. Although no Arizona case explains the

procedure for proving sister-jurisdiction convictions for the purpose of § 28-1383(A)(2) in particular, a process has been established for proving felony convictions from a sister jurisdiction for sentence enhancement. In that context, the trial court must conclude the conviction includes "'every element that would be required to prove an enumerated Arizona offense.'" *State v. Crawford*, 214 Ariz. 129, ¶ 7, 149 P.3d 753, 755 (2007), *quoting State v. Ault*, 157 Ariz. 516, 521, 759 P.2d 1320, 1325 (1988). Only the statutory definition of the prior crime, and not its factual basis, may be considered in making the comparison. *Id.* ¶ 8. The Arizona Supreme Court has stated repeatedly it will not allow what would be, "'in effect, a second trial on defendant's prior conviction.'" *Id.* ¶ 9, *quoting State v. Gillies*, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983); *see also State v. Roque*, 213 Ariz. 193, ¶ 81, 141 P.3d 368, 391 (2006) (same).

¶7 Jarrell has failed to explain why the same burden should not apply when proving a prior conviction for purposes of § 28-1383(A)(2). Jarrell suggests the state could have "presented . . . witnesses to the acts or certified transcripts from Florida." However, establishing facts of a prior crime at a second trial presents practical difficulties and impinges upon judicial economy. *Crawford*, 214 Ariz. 129, ¶ 9, 149 P.3d at 756. We see no reason to allow a "second trial" on the prior crimes for purposes of § 28-1383(A)(2). *See id.*

¶8 Neither do constitutional considerations compel a different result. Although Jarrell states that removing the factual basis of his prior convictions from the jury's consideration violates his constitutional rights to a jury trial and to receive

adequate notice of what conduct a statute proscribes, he has failed to develop either of these arguments. Therefore, he has waived these arguments on appeal. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (argument not developed on appeal waived). He does not explain which statutory provision is void for vagueness or how the jury's determination of certain facts would cure that infirmity. *See State v. McDermott*, 208 Ariz. 332, ¶ 13, 93 P.3d 532, 536 (App. 2004) (statute not void for vagueness because term may be interpreted in more than one way).

¶9 Moreover, proof of prior convictions is distinguishable constitutionally from other facts determined by a jury, in part because the defendant is guaranteed due process and the right to a jury trial in the first proceeding. *See Jones v. United States*, 526 U.S. 227, 249 (1999); *see also Gillies*, 135 Ariz. at 511, 662 P.2d at 1018 ("Evidence of a prior conviction is reliable, the defendant having had his trial and exercised his full panoply of rights which accompany his conviction."). For this reason, the fact of a prior conviction for sentence enhancement need not be submitted to a jury to preserve a defendant's constitutional right to have a jury determine all the essential elements of the charged offense. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 490 (2000). In each of Jarrell's prior DUI proceedings, for example, he was adjudicated guilty after pleading "no contest" to the charges and waiving his right to a trial. Jarrell does not allege he was denied his constitutional rights in the Florida proceedings, nor does he argue the state presented insufficient evidence of the fact of those convictions during his Arizona proceedings. Therefore, Jarrell has not demonstrated his Arizona convictions were

supported by insufficient evidence. *See State v. Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d 601, 608 (2005) (to prove fundamental error, must first show error).

¶10 Jarrell suggests additional proof was necessary here because "a [DUI] conviction under Florida law does not entail conduct that would constitute DUI in Arizona"; he contends the meaning of "actual physical control" differs under the case law of each jurisdiction. However, as explained above, if a sister-jurisdiction's statute does not "include[] 'every element that would be required to prove an enumerated Arizona offense,'" the prior conviction does not satisfy § 28-1383(A)(2) as a matter of law and any factual consideration by the jury is unnecessary. *Crawford*, 214 Ariz. 129, ¶¶ 6, 7, 149 P.3d at 755, *quoting Ault*, 157 Ariz. at 521, 759 P.2d at 1325. To the extent Jarrell attempts to argue the trial court made a legal error in determining the Florida and Arizona DUI statutes were comparable, he did not raise the issue below and has failed to argue on appeal that any such error was fundamental, arguing only that convictions based on insufficient evidence constitute fundamental error.[1] Therefore, he has waived the argument on appeal. *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (failure to argue alleged error fundamental waives argument on appeal).

[1]It is unclear from Jarrell's brief whether he intended to raise this argument as a separate issue on appeal. Although he stated in his summary that the statutory comparison was a "related argument," he limited his "issue presented" and "argument" headings to a single insufficient evidence issue. Perhaps his argument merely acknowledges that, if the statutory elements match, no additional factual showing would be necessary even under his proposed interpretation of § 28-1383(A)(2).

Disposition

¶11 For the foregoing reasons, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge